81-2404

No.

Office - Supreme Court, U.S.
FILED
JUL 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE GOLD BONDHOLDERS PROTECTIVE COUNCIL, INC,
Petitioner,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SCOTT P. CRAMPTON
BOGAN & FREELAND
1000 Sixteenth St., NW
Washington, DC 20036
(202) 223-4260
Attorney for Petitioner

Of Counsel
JAMES DEWEY O'BRIEN
812 Braeburn Drive
Fort Washington, MD 20744
(301) 292-9372

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Did the nation waive its sovereign immunity as to the debts of the United States by the approval of Section 4 of the Fourteenth Amendment?

2. When the United States had waived its sovereign immunity at the time it issued a Government bond, may the Congress thereafter withdraw the right to sue the United States without violating the Constitutional rights of the bondholder?

3. Does 31 U.S.C. § 773b, by closing the doors to all federal courts effective only as to holders of gold bonds from 1935 to 1975, result in an unconstitutional substantive enactment?[1]

---

[1] The caption contains the names of all parties.

TABLE OF CONTENTS

	Page
Petition for a Writ of Certiorari	1
Questions Presented	i
Opinion Below	1
Jurisdiction	1
Constitutional Provisions and Statute Involved	2
Statement	4
Reasons for Granting the Writ	4
Conclusion	9
Appendix A	1a

TABLE OF AUTHORITIES

CASES:	Page
Battaglia v. *General Motors Corporation*, 169 F.2d 257	6
Ex Parte McArdle, 74 U.S. 506	5
Lauf v. *E. G. Shinner & Co.*, 303 U.S. 323	5
Lynch v. *United States*, 292 U.S. 571	5
Perry v. *United States*, 294 U.S. 330	6
United States v. *Klein*, 80 U.S. 128	5
STATUTES:	
28 U.S.C. § 1346	1
28 U.S.C. § 1491	1
28 U.S.C. § 1255 (1)	1
31 U.S.C. § 773b	3, 6
MISCELLANEOUS:	
Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L. J. 498	5
Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics*, 66 Harv. L. Rev. 1362	5
Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 1st Sess.	7
Redish and Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45	5
Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 Geo. L. J. 839	5
2A Sutherland Statutory Construction, § 51.02	8
The Federalist, Alexander Hamilton Paper No. 78	8
Van Alystyne, *A Critical Guide to Ex Parte McArdle*, 15 Ariz. L. Rev. 229	5
Wechsler, *The Courts and the Constitution*, 65 Col. L. Rev. 1001	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

THE GOLD BONDHOLDERS PROTECTIVE COUNCIL, INC,
Petitioner,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, The Gold Bondholders Protective Council, Inc., prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered in this proceeding on April 7, 1982.

OPINION BELOW

The opinion of the Court of Claims (Appendix A, *infra* 1a), is reported at 676 F. Supp. 643 (1982).

JURISDICTION

The judgment of the Court of Claims (Appendix A, *infra* p. 1a, 7a) was dated April 7, 1982, and was entered the same day.

The jurisdiction of the Court of Claims was invoked under 28 U.S.C. §§ 1346 and 1491. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The pertinent provisions of the United States Constitution provide:

ARTICLE III.

* * * * * *

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * — to Controversies to which the United States shall be a party; * * *.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * * * *

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

* * * * * *

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. * * *

* * * * * *

The statute purporting to withdraw the jurisdiction of the Court of Claims is 31 U.S.C. § 773b which provides:

> Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action or defense in its own name or in the name of any of its officers, agents, agencies, or instrumentalities in any proceeding of any nature whatsoever (1) upon any gold-clause securities of the United States or for interest thereon, or (2) upon any coin or currency of the United States, or (3) upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition of any such coin or currency or of any gold or silver and involving the effect or validity of any change in the metallic content of the dollar or other regulation of the value of money, is withdrawn: *Provided*, That this section shall not apply to any suit commenced prior to August 27, 1935, or which may be commenced by January 1, 1936, or to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins, or currencies of the United States involved in such proceeding.

STATEMENT

Plaintiff, a Delaware corporation, is the owner of a $50 4-1/2% Gold Liberty Bond of 1933-38, which was issued October 24, 1918. The bond provided that the United States would pay the principal and interest in gold coin "of the present standard of value" upon presentation by the bearer to the Treasurer of the United States on or after October 15, 1938. On April 2, 1981, plaintiff's administrator presented the bond to the Treasury Department with a qualifying letter, demanding that the bond be returned to him in its present form unless payment was made either in gold coin or in United States currency having a face value sufficient to purchase gold coin equivalent to the value of the gold coin promised in the bond. By letter of April 14, 1981, the Treasury Department returned the bond to plaintiff's representative with the statement that his submission could not be treated as a presentation and surrender of the bond for payment because of the conditions which had been imposed. Thereafter, plaintiff filed this suit to recover the sum of $1,253.02 on its $50 bond, since gold was selling on the open market for approximately $518 an ounce on the date the bond was presented for payment. (Appendix A. *infra*, p. 2a.)

The case was heard by the Court below on cross motions for summary judgment, and it was noted that the facts are not in dispute (Appendix A, *infra*, 2a).

REASONS FOR GRANTING THE WRIT

I

The Court of Claims has decided an important question of constitutional law which has not been squarely met by opinions of this Court. The basic issue is whether Congress under the Constitution has the power to remove from the judiciary the ability to consider a constitutional question.

The opinion most often cited in this area is *Ex Parte McArdle*, 74 U.S. 506 (1869), in which the right of Congress to curtail the appellate jurisdiction of the Supreme Court was upheld, but with the recognition that this curtailment did not effect the jurisdiction previously exercised (p. 515).[2] In *United States* v. *Klein*, 80 U.S. 128, 146 (1872), it was held that Congress may not instruct the Supreme Court as to its handling of a particular case. Another case cited on this issue is *Lynch* v. *United States*, 292 U.S. 571 (1934), but despite the broad language used in that opinion the Supreme Court held that the statute involved had actually not withdrawn its jurisdiction and it reversed the holdings of the lower courts (292 U.S. at 587 and 589). The Norris-La Guardia Act which withdrew the right of the federal courts to issue injunctions was upheld in *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323 (1938), but in that case legislation had provided alternative procedures for resolving controversies among the parties.[3]

If the opinion below is permitted to stand there will be no jurisdiction in which a litigant may test the con-

---

[2] The previous opinion the year before, *Ex Parte McArdle*, 73 U.S. 318, 324 (1868), set forth the other routes open to litigants.

[3] Among the numerous articles on this subject are: Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics*, 66 Harv. L. Rev. 1362, 1365 (1953); Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006 (1965); Van Alystyne, *A Critical Guide to Ex Parte McArdle*, 15 Ariz. L. Rev. 229 (1973); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L. J. 498, 514 (1974); Redish and Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 76 (1975); and Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 Geo. L. J. 839, 851 (1976).

stitutionality of 31 U.S.C. § 773b. Such a situation makes a mockery of the age-old belief that for every wrong there should be a remedy.

II

The opinion below should also be reviewed to establish that sovereignty under the Constitution is vested in the people[4] and not in Congress. In Section 4 of the Fourteenth Amendment the citizens legislated to provide that the "validity of the public debt * * * shall not be questioned" (*supra*, p. 3). The Constitution is the supreme law of the land.

The opinion below, however, allows Congress to make a nullity of Section 4 by a provision withdrawing the jurisdiction of the courts with reference to a limited group of people who were holding the Liberty Bond portion of the public debt. But Congress is the agent of the people. It should not be permitted to thwart the will of the people as announced in the Constitution. *Battaglia* v. *General Motors Corporation*, 169 F.2d 254, 257 (2d Cir. 1948).

It was noted in the case of *Perry* v. *United States*, 294 U.S. 330 (1935) that the 1933 Joint Resolution there involved "went beyond the congressional power" (p. 354). If the basic resolution with respect to gold clauses of government obligations exceeded the power of Congress, then it would logically follow that a jurisdictional statute seeking to accomplish the same objective would likewise "exceed congressional power."

---

[4] *Perry* v. *United States*, 294 U.S. 330, 353 (1935).

III

The writ should be granted because the issue involved presents an important principle of law.[5] If Congress has authority to withdraw the jurisdiction of the courts in cases involving money, it logically follows that it has the same authority in cases presenting such emotionally charged problems as busing, abortions and school prayer.[6]

Once legislation curtailing jurisdiction of all routes to the Supreme Court is allowed to stand a Pandora's Box will have been opened. The nation then will no longer have three co-ordinate branches of government. The legislative branch will decide all important questions.

IV

The writ should also be granted to decide the relationship of the Fifth and Fourteenth Amendments to the Exceptions Clause of Article III.

---

[5] There are presently pending in Congress numerous bills to withdraw jurisdiction of the federal courts. On May 20, 21 and June 22, 1981, extensive hearings were held by the Subcommittee on the Constitution of The Committee on the Judiciary, 97th Cong., 1st Sess., which were entitled:

> Oversight Hearings to define the Scope of the Senate's Authority under Article III of the Constitution to Regulate the Jurisdiction of the Federal Courts (Serial No. J-97-30).

At these hearings a number of authorities on constitutional law presented their views as to the reach of Congressional legislation in this context.

[6] The House of Delegates of the American Bar Association voted almost unanimously in favor of a resolution urging Congress not to enact legislation purporting to curtail the jurisdiction of the federal courts. (68 A.B.A.J. 159, February, 1982, and 68 A.B.A.J. 386, April, 1982).

If there was originally any doubt as to the inability of Congress to withdraw the jurisdiction of the courts in actions involving the bonds of the Government, it is submitted that that doubt was removed by the Fifth Amendment. That Amendment provides that the Government may not take private property without just compensation and without due process of law.

Such a possible doubt was also removed by Section 4 of the Fourteenth Amendment providing that the validity of the public debt "shall not be questioned."

There is a rule of statutory construction to the effect that if there is any inconsistency between two statutes the latest expression of the legislature is to control.[7] In amending the Constitution, the citizens are the legislative body, and the same rule of statutory construction should apply.[8]

---

[7] 2A Sutherland Statutory Construction, § 51.02 (4th Ed. 1973).

[8] Cf. *The Federalist*, Alexander Hamilton Paper No. 78.

CONCLUSION

This Court has held that the Government may not repudiate its obligation under the Liberty Bonds. Congress should not be permitted to accomplish the same result by the unhealthy precedent of attempting to withdraw the consent of the Government to be sued.

Respectfully submitted,

SCOTT P. CRAMPTON
BOGAN & FREELAND
1000 Sixteenth St., NW
Washington, DC 20036
(202) 223-4260
Attorney for Plaintiff,

JAMES DEWEY O'BRIEN
812 Braeburn Drive
Fort Washington, MD 20744
(301) 292-9372
Of Counsel

July, 1982

In the United States Court of Claims

No. 258–81C

(Decided April 7, 1982)

THE GOLD BONDHOLDERS
PROTECTIVE COUNCIL, INC.
v. THE UNITED STATES

Scott P. Crampton, attorney of record for plaintiff. *Bogan & Freeland* and *James Dewey O'Brien*, of counsel.

Thomas W. Petersen, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant. *Adrian C. Hunte* was on the brief. *Rochelle E. Stern*, United States Department of the Treasury, of counsel.

Before, FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and KASHIWA, *Judge*.

ON CROSS MOTIONS FOR SUMMARY JUDGMENT

COWEN, *Senior Judge*, delivered the opinion of the court:

In this unusual case, we are required to determine the impact on plaintiff's claim of Chief Justice Charles Evans

Hughes' historic opinion in one of the Gold Clause decisions:[1] *Perry v. United States*, 294 U.S. 330 (1935).

Plaintiff, a Delaware corporation, is the owner of a $50 4-1/4% Gold Liberty Bond of 1933–38, which was issued October 24, 1918. The bond provided that the United States would pay the principal and interest in gold coin "of the present standard of value" upon presentation by the bearer to the Treasurer of the United States on or after October 15, 1938. On April 2, 1981, plaintiff's administrator presented the bond to the Treasury Department with a qualifying letter, demanding that the bond be returned to him in its present form unless payment was made either in gold coin or in United States currency having a face value sufficient to purchase gold coin equivalent to the value of the gold coin promised in the bond. By letter of April 14, 1981, the Treasury Department returned the bond to plaintiff's representative with the statement that his submission could not be treated as a presentation and surrender of the bond for payment because of the conditions which had been imposed. Thereafter, plaintiff filed this suit to recover the sum of $1,253.02 on its $50 bond, since gold was selling on the open market for approximately $518 an ounce on the date the bond was presented for payment.

The case is before the court on cross motions for summary judgment[2], and the facts are not in dispute. We hold that plaintiff's claim is barred by Section 2 of the Joint Resolution of August 27, 1935, 31 U.S.C. § 773b, and grant defendant's motion for summary judgment.

I.

Section 4 of the Fourteenth Amendment to the Constitution provides that: "The validity of the public debt of the United states * * * shall not be questioned." Since the

[1] "The Gold Clause decisions of February 18, 1935, have already taken their place among the great landmarks of American constitutional history. They have given a partial answer to some basic questions of constitutional law. * * *" 33 Mich. L. Rev. 647 (1935).

[2] In order to dispose of all legal issues raised by the undisputed facts, we have considered matters outside the pleadings and have elected to treat defendant's motion to dismiss as a motion for summary judgment pursuant to Rule 38(c). Since we have given full consideration to plaintiff's motion for summary judgment, the order of November 24, 1981, suspending proceedings on its motion for summary judgment is vacated.

plaintiff is relying principally on Section 4 and the decision of the Supreme Court in *Perry*, we shall consider, in order, the events which led to the Supreme Court's decision, the holding in that case, and the subsequent congressional enactment which withdrew the consent of the United States to be sued upon any gold clause securities of the Government except where payment sought is not in excess of the nominal value in dollars of the securities, or when suit was commenced by January 1, 1936.

The Gold Clause Joint Resolution of June 5, 1933, 31 U.S.C. § 463, declared that gold clauses were against public policy; that the use of such gold clauses was thereafter prohibited; and that every obligation, whether already incurred or incurred in the future, was to be discharged upon payment dollar-for-dollar in any coin or currency which at the time of payment is legal tender for public or private debts.

In *Perry*, the plaintiff, the owner of a $10,000 Fourth Liberty Loan 4–1/4% Gold Bond which was payable in United States gold coin of "the present standard of value," presented it for payment with a demand for delivery of the quantity of gold represented by $10,000 in gold coin at the time the bond was issued, or in the alternative, for payment of $16,931.25 in legal tender currency. Upon the Government's refusal to pay more than $10,000 in legal tender currency, plaintiff brought suit in the Court of Claims for the $16,931.25.

The case was submitted on certified questions to the Supreme Court, which held that the promise of the Government to pay the paper money equivalent of the gold coin specified could not be repudiated nor impaired by the Gold Clause Joint Resolution. The Court declared that the power of the Government to contract against subsequent repudiation or impairment of its obligation was derived by implication from its constitutional power to borrow money on the credit of the United States, pursuant to Article I, Section 8 of the Constitution. The decision was also based to some extent upon Section 4 of the Fourteenth Amendment.

However, the Court held that Perry could not recover for breach of contract, because he had suffered only nominal damages and the Court of Claims had no authority to entertain an action for nominal damages. This result was

reached on the ground that by congressional enactments in 1933 and 1934, the United States had abandoned the gold standard, required private persons to surrender to the Government all gold held by them, and provided that the holder of gold coin could not export it or engage in transactions of foreign exchange.

Within 6 months after *Perry* was decided, Congress reacted by passage of the Joint Resolution of August 27, 1935. Section 2 thereof, which is codified as 31 U.S.C. § 773b, is still in effect and provides as follows:

> § 773b. Same; withdrawal of consent to sue United States; exceptions.
>
> Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action or defense in its own name or in the name of any of its officers, agents, agencies, or instrumentalities in any proceeding of any nature whatsoever (1) upon any gold-clause securities of the United States or for interest thereon, or (2) upon any coin of currency of the United States, or (3) upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition of any such coin or currency or of any gold or silver and involving the effect or validity of any change in the metallic content of the dollar or other regulation of the value of money, is withdrawn: *Provided*, That this section shall not apply to any suit commenced prior to August 27, 1935, or which may be commenced by January 1, 1936, or to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins, or currencies of the United States involved in such proceeding.

We agree with the Government that in this statute, consent to sue the United States on the gold clause contained in plaintiff's bond was withdrawn and that the plaintiff's claim is barred by the doctrine of sovereign immunity.

II.

In an effort to overcome the difficult obstacle presented by 31 U.S.C. § 773b, plaintiff has advanced a number of

contentions. Its principal argument is that the statute is an abrogation of Section 4 of the Fourteenth Amendment and that under the broad holding in *Perry*, plaintiff is entitled to recover the amount claimed.

Relying on *United States v. Klein*, 80 U.S. 128 (1871), plaintiff also asserts that the statute is an unconstitutional attempt to invade the judicial province and as such violates the separation of powers doctrine. We think that plaintiff has confused the holding in the *Klein* case with the long-established power of Congress to withdraw its consent to sue the United States. In an unbroken line of decisions, it has been held that Congress may withdraw its consent to sue the Government at any time. *Schillinger v. United States*, 155 U.S. 163 (1894); *Lynch v. United States*, 292 U.S. 571 (1934); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Maricopa County v. Valley National Bank*, 318 U.S. 357 (1943); *Laycock v. United States*, 230 F.2d 848 (9th Cir. 1956).

It should be added that in *Perry*, both the majority opinion and the concurring opinion of Mr. Justice Stone recognized that neither Section 4 of the Fourteenth Amendment nor the implied obligation derived from the exercise of the sovereign power to borrow money on credit, affected the power of Congress to withdraw its consent to sue the United States. In the majority opinion, Chief Justice Hughes stated:

> * * * The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign. *Lynch v. United States, supra*, pp. 580, 582. [294 U.S. at 354.]

Even more explicit was the following statement in the concurring opinion of Mr. Justice Stone:

> There is no occasion now to resolve doubts, which I entertain, with respect to these questions. At present they are academic. Concededly they may be transferred wholly to the realm of speculation by the exercise of the undoubted power of the Government to withdraw the

privilege of suit upon its gold clause obligations. * * * [294 U.S. at 360.]

III.

Plaintiff's next contention is that the Government's violation of its agreement to redeem its bond in gold constitutes a taking of its property right, and therefore, that the Fifth Amendement prohibits the application of section 773b in this case. This argument is also rejected, because the Supreme Court ruled directly to the contrary in its landmark decision in *Lynch v. United States, supra.* There the Court recognized that: "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." 292 U.S. at 579. However, the Court went on to hold that:

> Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. * * * [292 U.S. at 581.]

IV.

Plaintiff also relies on the fact that since December 31, 1974, all United States citizens have been entitled to hold gold. In 1973 and 1974, Congress enacted two statutes which are sometimes referred to as the "Gold Ownership Amendments." The first of these was Public Law 93–110, 87 Stat. 352, and the second was Public Law 93–373, 88 Stat. 445. Both amendments became effective December 31, 1974. As a result, the prohibitions on gold ownership were lifted by repealing sections 3 and 4 of the Reserve Gold Act and by further providing that no law, rule, regulation, or order "may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad."

It is not clear whether plaintiff contends that 31 U.S.C. § 773b is no longer applicable as a result of the passage of the Gold Ownership Amendments. However, to resolve any doubt about the matter, we hold that section 2 of the Joint Resolution of August 27, 1935 was not repealed, either

expressly or by implication, by the 1973–74 statutes. No reference whatsoever was made to the Joint Resolution in either of the Gold Ownership Amendments, and it is clear that 31 U.S.C. § 773b was not expressly repealed. We find it is equally clear there is no implied repeal, and we base this conclusion on several recently decided cases between private parties involving obligations to make payment in gold or its equivalent. *Southern Capital Corp. v. Southern Pacific Co.*, 568 F.2d 590 (8th Cir. 1978); *Feldman v. Great Northern Ry. Co.*, 428 F. Supp. 979 (S.D.N.Y. 1977); *Equitable Life Assurance Society of United States v. Grosvenor*, 426 F. Supp. 67 (W.D. Tenn. 1976), *aff'd* 582 F.2d 1279 (6th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). In each case, the court held that by enacting the Gold Ownership Amendments, Congress did not intend to supplant the Gold Clause Joint Resolution of June 5, 1933, 31 U.S.C. § 463, which specifically prohibited the use of gold as a medium or measure of payment of contractual obligations. It was also decided by each of the cited cases that the Gold Clause Joint Resolution was not repealed, either expressly or impliedly by the 1973–74 enactments. Although these cases involved the viability of 31 U.S.C. § 463, the rationale of the decisions is equally applicable to 31 U.S.C. § 773b. Consequently, we find that this Act is still in full force and effect.

V.

Its suit may have added a footnote to history, but plaintiff has not demonstrated a right to recover on the basis of the gold clause contained in its bond. It follows, therefore, that defendant's motion for summary judgment is granted; plaintiff's motion for summary judgment is denied, and plaintiff's petition is dismissed.

☆ U.S. Government Printing Office: 361-518/1004

Office - Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2404

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE GOLD BONDHOLDERS PROTECTIVE COUNCIL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 5

Crown Coat Front Co. v. *United States*, 386 U.S. 503 6

Finn v. *United States*, 123 U.S. 227 7

Lynch v. *United States*, 292 U.S. 571 5

Maricopa County v. *Valley National Bank*, 318 U.S. 357 5

Nichols v. *United States*, 74 U.S. (7 Wall.) 122 7

Perry v. *United States*, 294 U.S. 330 ..... 1, 2, 3, 4, 5, 6

Schillinger v. *United States*, 155 U.S. 163 5

United States v. *Sherwood*, 312 U.S. 584 5

United States v. *Testan*, 424 U.S. 392 5

Constitution and statutes:

United States Constitution, Fourteenth Amendment, Section 4 6

Emergency Banking Relief Act of March 9, 1933, ch. 1, 48 Stat. 1:

48 Stat. 2, 12 U.S.C. 248(n) 2

Gold Clause Joint Resolution of June 5, 1933, 31 U.S.C. 463 2

Page

Constitution and statutes—Continued:

Gold Reserve Act of 1934, ch. 6, 48 Stat. 337:

48 Stat. 340, 31 U.S.C. 315b 2

48 Stat. 340, 31 U.S.C. 408a 2

Joint Resolution of August 27, 1935, 31 U.S.C. 773b 3-4, 5, 6

Second Liberty Bond Act, ch. 56, 40 Stat. 288, 31 U.S.C. 752 *et seq.* 1

Miscellaneous:

79 Cong. Rec. 12620 (1935) 3, 6

Treasury Department Circular No. 501 (Oct. 12, 1933) 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2404

THE GOLD BONDHOLDERS PROTECTIVE COUNCIL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a 1935 statute, 31 U.S.C. 773b, which withdrew in part the consent of the United States to be sued on gold clause securities after January 1, 1936, is unconstitutional as applied to an action brought in 1981 upon a $50 4¼% Gold Bond that matured in 1934.

1. In 1918, pursuant to the Second Liberty Bond Act, ch. 56, 40 Stat. 288, 31 U.S.C. 752 *et seq.*, the United States issued a series of obligations known as the Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938. These bonds contained a "gold clause," which provided that the "principal and interest hereof are payable in United States gold coin of the present standard of value." *Perry* v. *United States*, 294 U.S. 330, 347 (1935). The purpose of such gold clauses was to "afford protection [to bondholders] against loss * * * by setting up a standard or measure of the Government's obligation." *Id.* at 348. However, in 1933 and 1934, in response

to the economic problems caused by the Great Depression, the United States abandoned the gold standard. One part of this change was brought about by the Gold Clause Joint Resolution of June 5, 1933, 31 U.S.C. 463, which declared gold clauses, in both private and public obligations, to be against public policy and void.

This statute was immediately challenged by a holder of a 4¼% Gold Bond of 1933-1938. *Perry* v. *United States, supra.* The holder in *Perry* argued that the Gold Clause Joint Resolution was an unconstitutional attempt to impair the obligation of a contract and he demanded, upon maturity of his bond, payment in gold coin or its equivalent in currency. While a majority agreed with Perry that the Gold Clause Joint Resolution exceeded Congress' powers insofar as it applied to extant government obligations (294 U.S. at 348-354; *id.* at 361-381 (dissenting opinion)), the Court nonetheless dismissed Perry's claim for failing to state a cause of action for actual damages (*id.* at 354-358; *id.* at 358-361 (Stone, J., concurring).[1] The Court observed that Congress had changed the monetary system and that gold was no longer legal tender or a medium of exchange.[2]

---

[1]Justice Stone, whose vote was necessary to dispose of the case on this ground, concluded that the Court should not have undertaken to decide whether Congress had exceeded its powers with respect to outstanding obligations. 294 U.S. at 358-361.

[2]The United States officially abandoned the domestic gold standard in 1933-1934. Pursuant to authority granted by the Emergency Banking Relief Act of March 9, 1933 (48 Stat. 2, 12 U.S.C. 248(n)), gold held by private persons in the United States was required to be surrendered to the government. The Gold Reserve Act of 1934 prohibited private ownership of gold and provided for the termination of gold coinage and for the withdrawal from circulation and melting down of existing gold coins. Redemption of any currency of the United States in gold was, and remains, prohibited. 48 Stat. 340, 31 U.S.C. 315b, 408a. The United States was, and remains, prohibited from paying out or delivering any gold coin. 31 U.S.C. 315b.

Consequently, the government's obligation on the gold clause bonds was only to pay their dollar value; if the government so discharged its obligation on Perry's bond, Perry would suffer only nominal, and not actual, damages by the breach of the obligation.

The Court in *Perry* made clear that the United States could, notwithstanding its underlying obligation on the gold clause, assert its sovereign immunity and so defeat a suit for a remedy upon the obligation (294 U.S. at 353-354):

> Congress has not been vested with authority to alter or destroy [the binding quality of the promise of the United States] * * *. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign.

In his concurring opinion, Justice Stone similarly referred to the "undoubted power of the Government to withdraw the privilege of suit upon its gold clause obligations." *Perry* v. *United States, supra,* 294 U.S. at 360.

In response to Justice Stone's suggestion in *Perry,* Congress passed the Joint Resolution of August 27, 1935, which permitted suits on gold clauses to continue to be brought until January 1, 1936, a period regarded as "ample time for anyone who had any sort of a claim to present his claim." 79 Cong. Rec. 12620 (1935) (remarks of Sen. Fletcher). However, the United States withdrew its consent to be sued after that date on gold clause obligations in amounts exceeding the nominal dollar amount of the bonds. The Joint Resolution, 31 U.S.C. 773b, provides:

Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action or defense in its own name or in the name of any of its officers, agents, agencies, or instrumentalities in any proceeding of any nature whatsoever (1) upon any gold-clause securities of the United States or for interest thereon, or (2) upon any coin or currency of the United States, or (3) upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition of any such coin or currency or of any gold or silver and involving the effect or validity of any change in the metallic content of the dollar or other regulation of the value of money, is withdrawn: *Provided*, That this section shall not apply to any suit commenced prior to August 27, 1935, or which may be commenced by January 1, 1936, or to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins, or currencies of the United States involved in such proceeding.

2. Petitioner is a holder of a $50 Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, a bond of the same issue as that challenged in *Perry*. Petitioner's bond (No. 17727170) was called for redemption on April 15, 1934. Treasury Department Circular No. 501 (Oct. 12, 1933). However, the bond was not presented for payment at its maturity.[3] On April 2, 1981, 47 years after maturity, petitioner presented the bond for payment, requesting, as did the petitioner in

---

[3]Petitioner was not the owner of the bond at its maturity in 1934. Petitioner represented that it purchased the bond from the Numismatic and Antiquarian Service Corporation of America on September 29, 1980, for $529.60

Perry, that payment be made in gold coin or in currency sufficient to purchase a like amount of gold coin (Pet. App. 2a). The Treasury Department returned the bond, declining to consider this submission of the bond as a proper presentation and surrender in light of these conditions.

Petitioner then brought this action in the Court of Claims. The Court of Claims granted the government's motion for summary judgment (Pet. App. 1a-7a; 676 F. 2d 643). Relying upon the Joint Resolution of August 27, 1935, the court held that any claim for payment in excess of the nominal value of the bond was barred by sovereign immunity (Pet. App. 4a-6a).

3. The decision of the Court of Claims is correct. It rests on established principles of sovereign immunity and does not warrant further review.

That the United States may not be sued absent its consent has, from the first, been a "universally received opinion." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821) (Marshall, C.J.). Accord, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Even if the United States has consented to be sued, this consent may be withdrawn at any time. See *Maricopa County* v. *Valley National Bank*, 318 U.S. 357, 362 (1943); *Lynch* v. *United States*, 292 U.S. 571, 580-582 (1934); *Schillinger* v. *United States*, 155 U.S. 163 (1894). It was on the basis of these well settled principles that the Court in *Perry* recognized that the United States could withdraw absolutely its consent to be sued upon the very obligation at issue here, the gold clause in the Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938. *Perry* v. *United States*, *supra*, 294 U.S. at 354; *id.* at 360 (Stone, J., concurring). Accordingly, petitioner's premise, that "for

every wrong there should be a remedy" (Pet. 6), does not apply to the United States and never has.[4]

Moreover, even if there were merit to petitioner's claim that Congress could not *completely* divest the courts of jurisdiction to hear claims arising from a valid underlying government obligation, this case plainly does not present that issue. The holder of petitioner's bond at its date of maturity—April 15, 1934—was entitled, as was every holder of a Fourth Liberty 4¼% Gold Bond of 1933-1938, to have his claim fully aired in court, as long as the claim was brought prior to January 1, 1936. 31 U.S.C. 773b. Indeed, Congress intended in this statute to insure that "every man who had any sort of a claim, or imagined he had a claim, could bring his suit." 79 Cong. Rec. 12620 (1935) (remarks of Sen. Fletcher).[5]

This Court has observed on many occasions that "[t]here is no question of the power of Congress to define [temporally] the limits of its waiver of sovereign immunity." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 520

---

[4]Petitioner's reliance (Pet. 6) on Section 4 of the Fourteenth Amendment, which provides in pertinent part that "[t]he validity of the public debt * * * shall not be questioned," is misplaced. The Court in *Perry* expressly concerned itself with the relation of this constitutional provision to the government's obligations under the gold clause. While the Court found the Fourteenth Amendment to have a bearing upon the United States' substantive obligations, the Court nonetheless emphasized that "the United States may not be sued without its consent * * *." 294 U.S. at 354; see *id.* at 360 (Stone, J., concurring).

[5]Senator Fletcher observed that in light of *Perry*, it did not appear that any person could assert a valid claim under any gold clause obligations. 79 Cong. Rec. 12620 (1935). The Joint Resolution was deemed necessary, however, because "it is a nuisance for the Government to be troubled with litigation which might be brought involving cases pestiferous in their nature, without the hope of recovery, and therefore this joint resolution is presented to shut off that sort of contention and to conclude the whole matter." *Ibid.*

(1967); *Finn* v. *United States*, 123 U.S. 227, 232 (1887); *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 126 (1869). It is true, of course, that petitioner, having purchased this bond 45 years after the expiration of the limitations period, is unable to take advantage of the jurisdiction that Congress created for judicial consideration of the obligation of the United States under this bond. This merely means, however, that petitioner has purchased a stale law suit. No principle of constitutional law requires Congress to make judicial review available at the behest of *every* person who claims to have an interest in the manner in which the United States discharges one of its obligations. Rational and equitable expectations are fully satisfied if the controversy is of a sort that can be resolved at the behest of some aggrieved party. That is true here, for the holder of the bond at its maturity in 1934 could have obtained judicial review of the issue petitioner seeks to raise.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

DOJ-1982-09

Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2404

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THE GOLD BONDHOLDERS PROTECTIVE COUNCIL, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Claims

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

SCOTT P. CRAMPTON
BOGAN & FREELAND
1000 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 223-4260
Attorney for Petitioner

JAMES DEWEY O'BRIEN
812 Braeburn Drive
Fort Washington, MD 20744
(301) 292-9372
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF AUTHORITIES

CASES: Page

California Federal Life Insurance Co. v. *Commissioner*, 680 F.2d 85 3

Cordner v. *United States*, 671 F.2d 367 3

Joslin v. *United States*, 666 F.2d 1306 3

CONSTITUTION:

United States Constitution, Fourteenth Amendment, Section 4 2

MISCELLANEOUS:

Eder, "A Forgotten Section of the Fourteenth Amendment," 19 Cornell L. Q. 1 2

Record in *Perry* v. *United States*, 294 U.S. 330 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2404

THE GOLD BONDHOLDERS PROTECTIVE COUNCIL, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Claims

REPLY OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner does not agree that sovereign immunity was a factor in the *Perry* opinion. It seems clear that Mr. Perry would have won his case if he could have shown damages. He could not, but the present petitioner can.

1. The Argument Of The Government Makes A Mockery Of § 4 Of The Fourteenth Amendment

During the war years of 1862-1864 Congress issued fiat currency backed only by the credit of the Government which became known as "greenbacks". They dropped in value to about 35 cents on the dollar, and there was concern throughout the nation that they might not be redeemed.

It was against the backdrop of this historical situation that § 4 of the Fourteenth Amendment was approved. There appears to be little discussion in the reported cases or legal periodicals as to the intent of § 4.[1] In view of the then existing situation it seems reasonable to conclude that § 4 was designed to instill public confidence in the currency being circulated as greenbacks.

If the position of the Government in the case at bar is correct—namely, that sovereign immunity prevents § 4 from being effective—then the approval of § 4 by the amendment process was an idle gesture. In view of the clear language of § 4 it is certainly illogical to interpret it as being meaningless—which is what it is if its provisions are emasculated by the reach of sovereign immunity.

2. The Government Should Not Win Both Ways

Under its power to regulate currency the Government in 1934 repudiated its agreement to repay in gold the funds it had borrowed. It thereby kept for itself the increase in the value of gold that occurred in subsequent years.

On the other side of the coin, however, the Government refuses to recognize for tax purposes that the gold coins are currency of a fixed value. Thus, when a corporate dividend or a debt is paid in gold coins the Internal Revenue Service collects a tax on the market value of the gold

---

[1] The legislative history is discussed in the Brief of Claimant, pp. 17-21, and Claimant's Reply to the Brief for the United States, pp. 6-9, of the Record in *Perry* v. *United States*, October Term, 1934, No. 532. See also: Eder, "A Forgotten Section of the Fourteenth Amendment," 19 Cornell L. Q. 1 (1933).

rather than its value as currency. *Cordner* v. *United States*, 671 F.2d 367 (9 Cir. 1982); *Joslin* v. *United States*, 666 F.2d 1306, 1307 (10 Cir. 1981); and *California Federal Life Insurance Co.* v. *Commissioner*, 76 T.C. 107, 111, affirmed 680 F.2d 85, 86 (9 Cir. 1982).

It is difficult to understand how the authority to regulate currency can allow the Government such a double benefit.

Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT P. CRAMPTON
BOGAN & FREELAND
1000 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 223-4260

Attorney for Petitioner

JAMES DEWEY O'BRIEN
812 Braeburn Drive
Fort Washington, MD 20744
(301) 292-9372

Of Counsel